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SUPREME COURT, U.S.

NO. 80-5385

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

In Re DENNIS WILLIAMS, Petitioner,

ORIGINAL COPY

(DENNIS WILLIAMS,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS
and JAMES GREER, Warden,
Illinois State Penitentiary,

Respondents.)

ON MOTION FOR LEAVE TO FILE
ORIGINAL PETITION FOR WRIT OF
HABEAS CORPUS AD TESTIFICANDUM

BRIEF FOR RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

No opinions have been rendered as petitioner's direct appeal to the Supreme Court of Illinois is pending.

JURISDICTION

The jurisdictional requisites have been set forth in the Petition for an orginal Writ of Habeas Corpus Ad Testificandum. However, as treated more fully within the following argument, Respondents do not believe that the petitioner has shown any reason for this Court to exercise its sound judicial discretion to grant his petition.

QUESTIONS PRESENTED

1. Whether petitioner is ineligible for an original Writ of Habeas Corpus Ad Testificandum since he has exhausted neither his state nor his federal remedies and the appeal of his conviction is still pending in the Illinois Supreme Court on direct review.

2. Whether petitioner is ineligible for an original Writ of Habeas Corpus Ad Testificandum where he has shown no violation of any of his federal constitutional rights.

STATEMENT OF THE CASE

In the early morning hours of May 11,1978, petitioner Dennis William, Willie Rainge, and Verneal Jimmerson abducted Carol Schmal and Larry Lionberg from the Clark Service station in Homewood, Illinois, and brought the couple to an abandoned townhome at 1528 Cannon Lane, East Chicago Heights, Illinois. While Rainge held Mr. Lionberg downstairs, the petitioner, Jimmerson, and Kenny Adams brought Ms Schmal to an upstairs bedroom where they each raped her. Jimmerson then went downstairs and guarded Larry Lionberg while Rainge had his turn at Ms Schmal. Ms. Schmal was again raped by petitioner, Jimmerson and Rainge. After being raped seven different times, Ms Schmal was rolled onto her stomach and from a distance of a few inches, the petitioner fired two bullets into her head. The petitioner and his friends then shepherded Larry Lionberg into a nearby field and petitioner fired two bullets into Lionberg's head. Rainge took the gun and fired a bullet directly into Larry Lionberg's heart.

Subsequently, on October 20, 1978, petitioner, currently an inmate of the Illinois State Penitentiary, was convicted of the rape of Carol Schmal and the aggravated kidnapping and murders of Ms Schmal and Larry Lionberg by a jury in the Circuit Court of Cook County. Afterwards, a new jury was selected and a death penalty hearing was conducted pursuant to Ill. Rev. Stat. 1977, Ch. 38, § 9-1. On January 31, 1979, after hearing

evidence in aggravation and mitigation, the jury concluded that there was a statutory aggravating factor. The jury also concluded that there were no mitigating factors sufficient to preclude the imposition of the death penalty and determined that the defendant would be sentenced to death for the murders. Thereaften, the defendant was sentenced to death for the murders and to concurrent terms of 60 years for the rape of Carol Schmal and the aggravated kidnappings of Ms Schmal and Mr. Lionberg. (R. 5132, 5144)

Pursuant to Ill. Rev. Stat. 1977, Ch. 38, § 9-1(h), a conviction and sentence of death is subject to automatic review by the Illinois Supreme Court. On February 6, 1979, notice of petitioner's intention to appeal was filed. The petitioner is represented on his direct appeal by the Office of the Illinois State Appellate Defender. On June 21, 1980, petitioner's counsel filed in the Illinois Supreme Court a 285 page brief raising 25 separate claims of error. The appeal is presently pending before that court and the People of the State of Illinois have until December 19, 1980, in which to file their response brief and argument.

REASONS FOR DENYING MOTION FOR LEAVE TO FILE ORIGINAL PETITION FOR WRIT OF HABEAS CORPUS AD TESTIFICANDUM

I.

PETITIONER IS INELIGIBLE FOR AN ORIGINAL WRIT OF HABEAS CORPUS AD TESTIFICANDUM SINCE HE HAS EXHAUSTED NEITHER HIS STATE NOR HIS FEDERAL REMEDIES AND THE APPEAL OF HIS CONVICTION IS STILL PENDING IN THE ILLINOIS SUPREME COURT ON DIRECT REVIEW.

By statute, the State of Illinois provides a person such as petitioner with an automatic direct appeal to the Illinois Supreme Court. Ill. Rev. Stat. 1977, ch. 38, §9-1(h). In addition, the State of Illinois provides petitioner with several remedial procedures for attacking his conviction including a post-trial motion for a new trial, a writ of error coram nobis incorporated in Ill. Rev. Stat. 1977, ch. 110, §72, a writ of habeas corpus, and a post-conviction hearing. To date, however, petitioner has pursued only the automatic direct appeal and even that he has not pursued to judgment since the appeal is still pending in the Illinois Supreme Court. Indeed, petitioner's appellate counsel on that appeal only filed his brief, a 285 page document raising 25 separate claims of error based on a 5,400 page record, in June 1980, less than 3 months before petitoner bypassed his counsel and filed the instant petition. Respondent People of the State of Illinois is still in the midst of examining the record and preparing a response to those contentions, contentions that it took petitioner's counsel 14 months to formulate. In short, petitioner has not allowed any Illinois Court any opportunity to review any contentions he might have regarding the validity of his convictions. Instead, he has bypassed his own appellate counsel, the Illinois Courts and all lower federal courts and sought an original Writ of Habeas Corpus Ad Testificandum in this Court on the basis of his claim that his brother says that he knows a "drug pusher" who claims to know who killed Carol Schmal and Larry

Lionberg. Respondents submit that until the Illinois Supreme Court or some other state tribunal has had a proper and adequate opportunity to review petitioner's claims, the instant petition should not be heard in federal court.

The axiom that federal courts should avoid preempting the state judiciary on Constitutional challenges to a state criminal conviction is well entrenched in the rules and decisions of this Court and in the applicable federal statute, 28 U.S.C. 2254. Supreme Court Rule 27.3(a) requires an original petitioner to "state the reasons for not making application to the district court," and to "set forth specifically how and wherein the petitioner has exhausted his remedies in the state courts or otherwise comes within the provisions of 28 U.S.C. 2254(b)." As the previously mentioned facts demonstrate, petitioner could neither state his reasons for avoiding the lower federal courts since there obviously are none, nor tell this Court that he has exhausted his state remedies since he has barely begun pursuing them. Moreover, petitioner has made absolutely no showing that "adequate relief cannot be had in any other form or from any other court," as required by Supreme Court Rule 27.3(a).

In Ex Parte Abernathy, 320 U.S. 219 (1943), this Court declared that in all but exceptional circumstances it would not issue writs of habeas corpus where a petitioner from a state court had not exhausted his state remedies. See also, Ex Parte Hawk, 321 U.S. 114 (1944). The decision in Fay v. Nola, 372 U.S. 391 (1963), narrowed the exhaustion principle by holding that 28 U.S.C. 2254 was "limited in its application to failure to exhaust state remedies still open to the habeas applicant at the time he filed his application in federal court." However, in a footnote, the Court elaborated by saying that the old settled principles of exhaustion still applied in cases of "presently available state remedies." 372 U.S. 435, note 43.

Subsequently, in Wainwright v. Sykes, 433 U.S. 72, 87-90 (1977), this Court abandoned the Fay deliberate bypass standard. In its

place, the Court adopted a two part "cause and prejudice" test where a petitioner is barred from habeas review of a federal claim absent (1) a showing of "cause" for the non compliance with the state procedural requirement, and (2) some showing of actual "prejudice" resulting from the alleged constitutional violation. 433 U.S. at 84, 87. Thus the requirement of exhaustion, as to those incarcerated under state authority, which is deeply "rooted in considerations of federal-state comity," Preiser v. Rodriguez, 411 U.S. 475, 491 (1973), is still very much alive since "it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation." Fay v. Noia, 372 U.S. 391, 419-420 (1963).

The instant petition does not satisfy the exhaustion principle as formulated by any decision of this Court. Nor does it show any circumstance, much less an exceptional one, which would justify this Court in waiving the exhaustion requirement. Petitioner not only has numerous state remedies presently available to him, but he also has a direct appeal pending in the Illinois Supreme Court. Significantly, if petitioner allowed the Illinois Supreme Court the opportunity to consider the 25 claims of error he has presented there in his brief on direct appeal, his claim of a "drug pusher" with new evidence as justifying a collateral attack such as this petition may be irrelevant. Consequently, absent a showing of exhaustion, unavailability, or ineffectiveness of the state corrective process, United States Courts should decline to hear the petitioner. Both state and federal courts are structured into a procedural hierarchy through which cases must move in an orderly fashion. Maintenance of an effective system of justice requires that petitioner's scatter gun approach for obtaining relief be rejected in favor of the orderly system now functioning in the United States.

II.

PETITIONER HAS NOT SUFFERED ANY VIOLATION OF HIS FEDERAL CONSTITUTIONAL RIGHTS WHICH WOULD ENTITLE HIM TO A WRIT OF HABEAS CORPUS AD TESTIFICANDUM IN THIS COURT.

To justify the issuance of a federal Writ of Habeas Corpus Ad Testificandum, a state prisoner must show that his imprisonment somehow violates rights guaranteed him, by the United States Constituition. See, 28 U.S.C. 2241(c)(3); Fay v. Noia, 372 U.S. 391, 409, 412; Mathis v. Colorado, .425 F.2d 1165, 1166 (10th Cir. 1970). Respondents submit that the facts and allegations of the instant petition, taken individually or as a whole do not describe a violation of any rights of the petitioner, much less those protected by the First Ten and the Fourteenth Amendments. Taken as a whole and construed in their best light, petitioner's allegations merely imply that petitioner believes in his own innocence, that he knows somebody who claims to know a "drug pusher" who claims to know "who shot them folks" (Pet. at 3), and that his attorney was ineffective since the State brought petitioner to trial before petitioner was discharged for violation of his right to a speedy trial. These claims hardly amount to allegations that any of petitioner's federal constitutional rights were violated. In fact, petitioner does not even suggest that the evidence adduced at trial did not establish beyond a reasonable doubt that he was the leader of the gang that abducted Carol Schmal and Larry Lionberg, gang raped Ms Schmal and then executed Ms Schmal and Mr. Lionberg.

Moreover, many of petitioner's statements are false and misleading. Petitioner supposedly quotes selected passages from the transcript of pre-trial proceedings and suggests that his trial counsel was forced to trial before he was ready. However, the record in its entirety shows that when the State announced that it was ready for trial, counsel, after having previously and repeatedly demanded trial, claimed that he was not now ready to proceed in the case of petitioner's co-defendant Paula

Gray. Defense counsel, however, did not represent that he was not ready to proceed to trial on the charges against petitioner.

Further, although petitioner suggests that a "Bruton Situation" arose since his trial counsel also represented Paula Gray, what the petitioner does not tell the Court and what the record clearly shows, is that Paula Gray was tried before a different jury than was the petitioner. Therefore, Paula Gray's grand jury testimony graphically describing petitioner's role as the person who twice raped and then put two bullets into the head of Carol Schmall and who fired two bullets into the back of the head of Larry Lionberg, was not placed before the jury trying petitioner. Thus, there was no denial of petitioner's right of confrontation and no situation described as error by this Court in Bruton v. United States, 391 U.S. 123 (1968).

Finally, petitioner's suggestion that his right to fundamental fairness, due process, and equal protection was denied by "the fact of the Illinois Supreme Court disregarding Petitioner's Motion to Vacate the Illinois Attorney General [William Scott] From Representation of the State Against" him is not only specious but moot as well. First, under Illinois law, it is the State's Attorney of Cook County, Bernard Carey, and his assistants who have jurisdiction to prosecute at the trial and initial appellate level all criminal cases arising in Cook County, Illinois. Moreover, although the Illinois Attorney General has primary jurisdiction to represent the State in criminal matters before the Illinois Supreme Court, as in most other criminal matters arising in Cook County, the Attorney General has conferred on the Cook County State's Attorney the right to represent the State in both this Court and the Illinois Supreme Court in matters involving the instant petitioner. Second, on July 29, 1980, more than 1 month before the instant petition was filed, Tyrone C. Fahner ascended to the Office of the Illinois Attorney General. Therefore, any claim that petitoner might have had regarding the representation of the State in this matter by William Scott as

Attorney General was and is moot. Third, except for his unsupported claim, petitoner has shown no manner in which the representation of the State of Illinois by William Scott as Attorney General has in any way denied petitioner any right guaranteed by the United States Constitution.

CONCLUSION

For the reasons stated herein, Respondents request that the motion for leave to file an original petition for Writ of Habeas Corpus Ad Testificandum be denied.

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